E COPY

FILED
APR 7 1955
HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 652

WARREN M. WILSON, Petitioner,

v.

HOMESTEAD VALVE MANUFACTURING COMPANY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES M. THORP, JR.
2900 Grant Building
Pittsburgh 19, Pa.
Counsel of Record for
Respondent Homestead Valve
Manufacturing Company

Of Counsel:
CLYDE A. ARMSTRONG
JOSEPH E. MADVA
THORP, REED & ARMSTRONG

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX TO BRIEF

PAGE

Questions Presented 1

Statement of the Case 3

Summary of Argument 14

Argument 16

I. This Controversy Concerns Merely the Construction of a Particular Contract and Its Outcome Is of Concern Only to the Parties Involved 16

II. The Decision of the Court of Appeals Below, Which Is Based Upon Pennsylvania Law, Is Not in Conflict in Fact or in Law With Decisions of Other Courts of Appeals 19

III. The Decision of the Court of Appeals Below Is Not in Conflict with Decisions of the Pennsylvana Courts 25

IV. Petitioner Has Not Been Deprived of His Right to Trial by Jury 30

V. Conclusion 35

TABLE OF CITATIONS

CASES

Albright v. Kalbitzer, 62 F. S. 815 (E.D.Pa., 1945) 29

Alpha Claude Neon Corp. v. Pennsylvania Distilling Co., Inc., 325 Pa. 140, 188 A. 825 (1936) 32

American Warming & Ventilating Company v. Fayette Lumber Company, Ltd., 57 Pa. Superior Ct. 608 (1914) 34

Armstrong v. Standard Ice Co., 129 Pa. Superior Ct. 207, 195 A. 171 (1937) 33

CASES PAGE

Atkinson v. New Britain Machine Co., 154 F. 2d 895 (CCA 7, 1946) 22, 23

Brandenburg v. Brooke, 45 Pa. Superior Ct. 490 (1911) 29

Coffey v. The Maccabees, 292 Pa. 58, 140 A. 551 (1928) 33

Collison v. Philadelphia Company, 233 Pa. 350, 82 A. 474 (1912) 33

Commonwealth v. Henry W. Horst Co., 364 Pa. 403, 72 A. 2d. 131 (1950) 32

Commonwealth v. Nelson-Pedley Construction Co., 303 Pa. 174, 154 A. 383 (1931) 34

Creveling v. Wood & Leman, 195 Pa. 152 (1880) 15, 27, 32

Dalmas v. Kemble, 215 Pa. 410, 64 A. 559 (1906) ... 33

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 21

Fisher v. Ronemus, 267 Pa. 325, 110 A. 87 (1920) .. 32

Galloway v. United States, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943) 34

Huddleston v. Dwyer, 322 U. S. 232, 64 S. Ct. 1015, 88 L. Ed. 1246 (1944) 21

Klaxon Co. v. Stentor Electric Mfg. Co. Inc., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941) 20

Koons v. Steele, 19 Pa. 203, 210 (1852) 32

Kosson v. West Penn Power Co., 293 Pa. 131, 141 A. 734 (1928) 33

Layne & Bowler Corporation v. Western Well Works, Inc., et al., 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712 (1923) 16

BLEED THROUGH POOR COPY

Table of Citations.

CASES	PAGE
McMillin v. Titus, 222 Pa. 500, 72 A. 240 (1909)	32, 33
Newhall v. Victor Box Mfg. Co., 269 Pa. 545, 113 A. 59 (1921)	15, 26
Ohio Marble Company v. Byrd, 65 F. 2d. 98 (CCA 6, 1933)	21, 22, 23
Peoples Natural Gas Co. v. Braddock Wire Co., 155 Pa. 22, 25 A. 749 (1893)	32
Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290 (1938)	19
Say v. Prior Oil Co., 157 Pa. Superior Ct. 629, 43 A. 2d. 417 (1945)	33
Sherman v. Consolidated Dental Mfg. Co., 202 Pa. 446, 52 A. 2d. 1 (1902)	32
Small Co., A. B. v. Lamborn & Co., 267 U. S. 248, 45 S. Ct. 300, 69 L. Ed. 597 (1925)	33
Stryker v. Montoursville Borough, 57 Pa. Superior Ct. 100 (1914)	34
United States National Bank v. Campbell, 354 Pa. 483, 47 A. 2d. 697 (1946)	32
Wachter v. Phoenix Assurance Co., 132 Pa. 428, 19 A. 289 (1890)	33
Wannamaker v. Burke, 111 Pa. 423, 2 A. 500 (1886)	33

COURT RULES

Federal Rules of Civil Procedure, Rule 50(b)	34
Revised Rules of the Supreme Court of the United States	19, 25, 29

Table of Citations.

TEXT AUTHORITIES	PAGE
American Bar Association Journal, Vol. 20, p. 341 (1934)	19
Corpus Juris, Vol. 13, p. 545	34
Corpus Juris Secundum, Vol. 17, pp. 753-754	34
Cyclopedia of Federal Procedure, 2d. Ed., Vol. 11, p. 30	19
Harvard Law Review, Vol. 48, pp. 238, 262-263	19
Willison on Contracts, Rev. Ed., Vol. 4, Sec. 1030	23

BLEED THROUGH POOR COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

NO. 652

WARREN M. WILSON, Petitioner,

v.

HOMESTEAD VALVE MANUFACTURING COMPANY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether this Court in the exercise of its discretion should review a final decision of the Court of Appeals below which is based upon the construction as a matter of law of a contract of employment and upon an analysis of the conduct of the parties supporting such construction.

2. Whether this Court in the exercise of its discretion should review the decision of the Court of Appeals below which is controlled by the law of the Commonwealth of Pennsylvania, where petitioner contends that the decision is in conflict with decisions of other circuits, but which other decisions did not purport to follow the Pennsylvania law.

Questions Presented.

3. Whether this Court in the exercise of its discretion should review the final decision of the Court of Appeals below, which follows Pennsylvania decisions in holding that a general rule applicable to commission salesmen is not applicable to the claim of the Sales Manager petitioner, on the alleged ground that a conflict exists between such final decision and other decisions of the Pennsylvania Courts and of other Courts of Appeal wherein those Courts applied such general rule in construing the contracts of commission salesmen.

4. Whether this Court in the exercise of its discretion should review the final decision of the Court below sustaining the action of the Trial Court in setting aside a special verdict on a question submitted to the jury involving the construction of an employment contract, which the Court below and the Trial Court after verdict held to be unambiguous and its interpretation supported by uncontroverted and conclusive evidence of the practical construction thereof by the parties themselves.

BLEED THROUGH POOR COPY

STATEMENT OF THE CASE

These proceedings commenced on December 31, 1946 (J.A. 261) when the petitioner, Warren M. Wilson, an Ohio citizen, filed his Complaint in assumpsit (J.A. 6a-9a) against the respondent, Homestead Valve Manufacturing Company, a Pennsylvania corporation, whereby petitioner sought to recover compensation in excess of $85,000 allegedly due him from respondent as bonus for the period from January 1, 1941 to and including March 18, 1942, together with interest. During the period between February 1, 1940, and March 18, 1942, petitioner was employed by respondent as its Eastern District Sales Manager under two written agreements. The first agreement covered the period from February 1, 1940, to and including December 31, 1940, and expired by its own terms (Def. Ex. C, J.A. 57a, 357a; 19a). The second agreement, substantially identical in its provisions with the first or 1940 agreement, was dated January 30, 1941 (Pl. Ex. 1, J.A. 44a, 309a; 57a-58a), and was terminated by respondent as of March 18, 1942, by thirty days' prior written notice given to petitioner as provided and authorized by the contract (Pl. Ex. 13, J.A. 51a, 337a; 51a-52a; 107a-108a; 227a; 265a).

At the time of the matters in suit, respondent owned and operated a manufacturing plant located in Moon Township, Allegheny County, Pennsylvania, where it manufactured two distinct types of products, viz., (1) Hypressure Jennys or steam cleaning machines, and (2) valves for various industrial and commercial uses.

Respondent first employed petitioner in 1935 upon his graduation, at the age of twenty-four, with a me-

chanical engineering degree, from Carnegie Institute of Technology. He was immediately placed in a training program consisting of engineering and sales work, which extended over a period of approximately 3½ years (Complaint, par. 1, J.A. 6a; 15a-16a, 53a-55a, 208a). From the end of 1938 to February 1, 1940, petitioner was employed as respondent's Eastern District Sales Manager for the sale of Hypressure Jennys only, except for a brief period during which he was in charge of valve sales to steel mills, which he was able to handle as the result of his training in respondent's Engineering Department (J.A. 16a-17a, 55a-56a, 209a). On February 1, 1940, at the age of twenty-nine, he succeeded one P. L. Rhodes as respondent's Eastern District Sales Manager for the sale of Homestead Valves, as well as Hypressure Jennys (J.A. 16a, 55a-56a).

The written agreement between the parties, effective February 1, 1940, governing petitioner's employment (Def. Ex. C, J.A. 57a, 357a) has been referred to. Pursuant thereto, petitioner was paid a salary of $250.00 a month and, in addition, a bonus of $1,346.89 at the end of that year (Def. Ex. D, J.A. 275a, 359a).

Each of the two agreements of 1940 and 1941 aforesaid provides that petitioner was to receive for his services as Eastern District Sales Manager a monthly salary of $250.00 and a bonus calculated by graduated percentages of the "aggregate yearly earnings" from "sales" in his territory of Homestead Valves and Hypressure Jennys, as well as miscellaneous commissions on industrial sales of Jennys. While no mention is made in either contract of the splitting of commissions or bonus in

BLEED THROUGH POOR COPY

inter-territory transactions or of sales of valves and Jenny parts and compounds, respondent, in calculating the bonus of $1,346.89 (Def. Ex. D, J.A. 275a, 359a) due petitioner under the 1940 agreement, included therein compensation to petitioner on the sale of parts and compounds (J.A. 135a), and also accorded to petitioner the benefits of a practice of splitting commissions and bonus credits of inter-territory sales on the following basis: one-third to the territory in which the order was placed, one-third to the territory to which shipment was made, and one-third to the territory in which customer engineering was done (Complaint, J.A. 7a-8a; 231a). The term "customer engineering" describes one of the functions or duties of a District Sales Manager's position, viz., that of recommending to a customer the particular Homestead Valve most suitable to meet the customer's particular need (J.A. 177a-178a).

In February, 1942, petitioner went to the respondent's plant to settle his 1941 bonus and negotiate a new contract for the year 1942 with Mr. F. E. Schuchman, respondent's General Sales Manager (J.A. 217a-218a, 244a, 264a-265a).

At the meeting a dispute arose over petitioner's asserted claim to a bonus on contracts for the manufacture and sale of special welded and cast steel manifold valves to the United States Navy and to the United States Maritime Commission. The first of these contracts was entered into several months after the execution of the 1941 agreement aforesaid, (Court's Ex. 1, Schedule 3, J.A. 150a-151a, 305a; 83a-85a, 195a-196a, 257a). These contracts involved valves of a type never

theretofore manufactured by respondent and the dollar volume thereof was very substantial. When petitioner persisted in his claim *inter alia* to such a bonus on the aforesaid manifold valves, respondent terminated the agreement, with petitioner's acquiescence therein, by written notice dated February 16, 1942, effective March 18, 1942 (Complaint, par. 8, J.A. 9a; Pl. Ex. 13 and 14, J.A. 51a-52a, 337a-338a).

While it became clear in negotiations immediately thereafter that no amicable settlement of petitioner's unwarranted and exorbitant claims was possible, petitioner delayed the filing of his suit for almost five years, viz., until December 31, 1946 (J.A. 261a).

Petitioner's contentions below fell into four principal categories. He claimed that he was entitled to a bonus, under his contract, with full interest, on: (1) all orders for Homestead Valves, valve parts, Hypressure Jennys, and Jenny parts and compounds received by respondent on or prior to March 18, 1942, and completed by shipments, whether before or after that date; (2) all orders for special welded manifold valves from the United States Navy and all orders for special cast steel manifold valves from the United States Maritime Commission received by respondent on or prior to March 18, 1942, and completed by shipments into petitioner's territory, whether before or after that date; (3) orders for valve parts for 10-valve manifold assemblies from National Radiator Company received on or prior to March 18, 1942, and completed by shipments, whether before or after that date; and (4) an order for 150 Hypressure Jennys, which were originally ordered from London, England, on December 11, 1941, but were pur-

BLEED THROUGH POOR COPY

chased by the United States War Department acting for the British Purchasing Commission and shipped on or prior to January 16, 1942, through the British Ministry of War Transport in New York City for export to England.

Respondent, on the other hand, contended that petitioner was not entitled, either under the facts or the law, to interest prior to final judgment or to bonus on: (1) orders for Homestead Valves, valve parts, Hypressure Jennys, and Jenny parts and compounds received prior to March 18, 1942, unless they ripened into sales by completion and shipment on or before March 18, 1942, as evidenced by the express provisions of the contract, as well as by the practical construction thereof by the parties; (2) orders for manifold valves from branches of the United States Government, whether shipped before or after March 18, 1942, for the reasons (a) that such valves are not within the express provisions of the contract, which covers specifically "sales" of "Homestead Valves" only, and (b) that "sales" of manifold valves were not within the contemplation of the parties when the contract in suit was executed; (3) orders for parts for the 10-valve manifold assemblies, for the same reasons as are set forth in the preceding clause (2) and for the further reasons (a) that the origin of the orders as well as the destination of the shipments thereof were not within the territory of petitioner as set forth in the contract in suit, and (b) that no engineering took place in petitioner's territory; or (4) the order for the aforesaid 150 Hypressure Jennys, for the reasons (a) that the origin of the order and the destination of shipment was England, which was not within petitioner's

territory, and (b) that no engineering on such order took place in petitioner's territory.

On May 2, 1951 (J.A. 3a), the District Court appointed a Master to calculate the compensation that would be due petitioner under the aforesaid respective contentions of the parties, with the result that the Master filed a Report subsequently introduced into evidence as the Court's Exhibit 1 (J.A. 150a-151a, 299a-308a).

A jury trial was held before the Court, beginning on February 27, 1952, and concluding on March 6, 1952, with the late Honorable Owen M. Burns presiding (J.A. 3a). Respondent admitted at the trial that petitioner was entitled to the sum of $13,965.10 (J.A. 293a), which sum represents bonus payable to petitioner for the period between January 1, 1941, to and including March 18, 1942, calculated, in accordance with the contract provisions, on the earnings realized from sales represented by shipments of Homestead Valves, valve parts, Hypressure Jennys, and Jenny parts and compounds made by respondent during that period (Court's Ex. 1, page 7, and Schedule 2 thereto, J.A. 150a-151a, 304a; 145a).

At the conclusion of the trial, respondent requested that binding instructions on the issues be given to the jury (J.A. 369-371a), all of which were refused (J.A. 292a), including the requested instruction that:

> "Under the law and all the evidence in this case, including the written contract of January 30, 1941 (Plaintiff's Exhibit No. 1), Plaintiff is not entitled to any compensation based upon any shipments made after March 18, 1942 on orders for such sales dated prior to March 18, 1942."

BLEED THROUGH POOR COPY

The Court submitted the claims of the petitioner to the jury for its special Verdict in answer to the following questions (J.A. 292a-293a, 372a-373a):

"1. Is the plaintiff, Warren M. Wilson,, entitled to a bonus credit on shipments made after March 18, 1942, the date of termination of plaintiff's employment contract with the Homestead Valve Manufacturing Company, the defendant, on orders received by the Company before that date? Answer yes or no. .....

"2. Did the plaintiff and the defendant, by their contract dated January 30, 1941 (Plaintiff's Exhibit 1), intend to include within the words 'Homestead Valves' or 'Valves'—which words appear in that contract—the special welded steel manifold valves thereafter ordered by the United States Maritime Commission? Answer yes or no. .....

"3. Is the plaintiff entitled to a bonus based upon the parts for manifold valve assemblies manufactured and shipped by defendant Company as a sub-contractor for National Radiator Company of Johnstown, Pennsylvania, under contract with the United States Maritime Commission? (The shipments by defendant to National Radiator Company, at New Castle, Pennsylvania, appear on Schedule 4 of the 'Report of Norbert F. Stanny, Master'.) Answer yes or no. .....

"4. Is plaintiff entitled to a bonus based upon the shipment of 150 Hypressure Jennys purchased for the British Purchasing Commission through the

War Department Quartermaster Corps, Holabird Quartermaster Depot, Baltimore, Maryland, and shipped to British Ministry of War Transport in New York City for export to England? Answer yes or no. ....."

The jury answered "Yes" to each of the four said questions propounded to it (J.A. 297a-298a, 372a-373a), wth the result that the Trial Court, by its Order dated March 7, 1952, entered judgment in favor of petitioner in the amount of $132,136.84, with costs, other than the Master's fee, the fixing and assessing thereof being left for determination at a later date (J.A. 374a).

The judgment included the principal sum of $85,367.04 and interest thereon for various periods beginning with January 1, 1942 to March 1, 1952, in the amount of $46,769.80, broken down as follows (Court's Ex. 1, J.A. 150-151a, 300a-303a; 141a-143a):

Item	Principal	Interest
Manifold valves, valves, parts, compounds and Jennys	$73,832.54	$40,392.54
Manifold valve assemblies	7,303.60	4,050.10
British Jennys	4,230.90	2,327.16
	$85,367.04	$46,769.80

On March 11, 1952 (J.A. 4a), respondent filed a Motion to set aside so much of the verdict and the judgment entered thereon as was in excess of $13,965.10, to alter or amend the judgment in accordance with the law and the evidence, or, in the alternative, to grant respondent a new trial (J.A. 375a-377a). Among the reasons assigned for the Motion was the error of the Court in submitting Question No. 1 of the Verdict to the Jury.

BLEED THROUGH POOR COPY

The trial judge having died in the meantime, the Motion was argued before the Court with the Honorable Joseph P. Willson presiding on February 11, 1954 (J.A. 4a).

Upon consideration of the Motion, the District Court concluded (Opinion, J.A. 378a-388a) that Questions Nos. 2, 3 and 4 of the Special Verdict were properly submitted to the jury, but that since the contract between the parties was "neither ambiguous nor of doubtful meaning" (Opinion, J.A. 383a), the trial judge erred in failing to interpret the contract as a matter of law and in submitting Question No. 1 to the jury (Opinion, J.A. 387a). The District Court also concluded that due to the nature of the claim and the fact that it was unliquidated, it was "just and equitable that no interest be allowed until the date of entry of the original judgment" (Opinion, J.A. 387a).

As a result, the District Court entered an Order dated March 6, 1954 which, as subsequently corrected (J.A. 388a-389a), vacated and set aside Special Verdict No. 1 and so much of the judgment of March 7, 1952 as exceeded the sum of $33,126.69, composed of principal sums and interest thereon for the period between March 7, 1952 and March 6, 1954 as follows (Court's Ex. 1, J.A. 150a-151a, 300a-304a; 142a-143a):

Item	Principal	Interest
Manifold Valves	$ 9,119.65	$1,094.53
Manifold Valve Assemblies	2,261.76	271.41
British Jennys	4,230.90	507.71
Other Valves, Jennys, parts and compounds	13,965.10	1,675.81
	$29,577.41	$3,549.28

The Order of the District Court also taxed the costs against respondent and directed that respondent pay the Master's fee of $490C (J.A. 388a).

The net effect of the final judgment of the District Court below was to sustain petitioner in all of his claims to bonus on all sales which were completed by respondent by shipment on or before March 18, 1942, the date of termination of petitioner's employment contract, and to reject petitioner's claims to bonus on sales completed after that date and to interest on the principal sum recovered by him for any time prior to the date of the entry of the original judgment on March 7, 1952.

Petitioner appealed to the Court of Appeals for the Third Circuit on April 2, 1954, (J.A. 5a), whereupon respondent filed its cross-appeal on April 5, 1954. (J.A. 6a).

With respect to the respondent's cross-appeal and its contentions therein that Questions Nos. 2, 3 and 4 should not have been submitted to the jury, the Court of Appeals concluded that the language of the contract with respect to the matters encompassed in those questions was sufficiently ambiguous to justify their submission to the jury for its verdict (Opinion: Petition, p. 64). Inasmuch as the recovery allowed petitioner by the Courts below was in excess of the sum admitted by respondent to be due him, the Court of Appeals rejected respondent's further contentions that the master's fee and the petitioner's costs should not be taxed against respondent (Opinion: Petition p. 71).

Petitioner contended before the Court of Appeals that the District Court erred: (a) in ruling as a matter of law that petitioner could not recover bonus on shipments made by respondent after termination of his em-

BLEED THROUGH POOR COPY

ployment, (b) in setting aside the verdict of the jury resolving issues of fact in favor of petitioner concerning construction of the contract by the parties and in entering judgment as a matter of law for the respondent, and (c) in disallowing interest prior to verdict and judgment.

The Court of Appeals sustained the last contention of petitioner, being of the opinion that, although the claim was in a sense unliquidated and the question had not been squarely passed upon by the courts of Pennsylvania, "it would seem that interest is allowable as of right in a case such as the one here involved" (Opinion: Petition pp. 69-70).

With respect to the first two contentions of the petitioner, the Court of Appeals agreed with the conclusion of the District Court that the contract unambiguously restricted the petitioner's bonus credit to sales delivered during his employment (Opinion: Petition pp. 66-67); that petitioner's own testimony and the uncontradicted evidence show that it was the established practice of respondent to compute bonus on deliveries rather than on booked orders (Opinion: Petition, p. 68); that petitioner had had the advantage of that practice with respect to orders received in his predecessor's term of office as Eastern District Sales Manager but not shipped until petitioner assumed that office; that, consequently, binding instructions on the point as requested by respondent should have been given, and that the District Court was right in setting aside the jury's answer to Question No. 1 of the Special Verdict (Opinion: Petition, pp. 68-69).

Not satisfied with the decision of the Court of Appeals, petitioner has filed his Petition for a Writ of

Certiorari with this Honorable Court. Convinced, for the reasons hereinafter stated, that no basis exists for the granting of certiorari in this case, respondent has not burdened this Honorable Court with a cross-petition, although Respondent is considerably more aggrieved with the results of the action of the Court below than is petitioner.

SUMMARY OF ARGUMENT

I. The Petition in this case is completely devoid of any basis, substantial or otherwise, for the granting of a Writ of Certiorari. The entire matter before the Court of Appeals below was one of construction of a written contract of employment based not only upon the language peculiar to the contract in controversy but also upon the construction the parties, by their admitted actions in performance thereof, had placed upon the contract.

II. The claim that the decision of the Court of Appeals below is in conflict with decisions of the Courts of Appeal of other circuits is spurious and untenable, as the facts in the cases cited by the petitioner have no parallel with the facts of the instant case, and, even if they were parallel, it is not the type of conflict among circuits that justifies or motivates the granting of a writ of certiorari for the reason that the question involved is controlled by state law, with respect to which the Court below may not exercise an independent judgment.

III. The claim that the decision is in conflict with Pennsylvania decisions is similarly untenable. This case involves the employment contract of a sales manager

BLEED THROUGH POOR COPY

who was required to perform various duties, including supervisory duties, thereunder, and is readily distinguishable from the Pennsylvania cases relied on by petitioner which involved the employment contracts of commission salesmen whose sole duty thereunder was to procure orders. The decision of the Court below is supported by other decisions of the Pennsylvania Supreme Court in *Newhall v. Victor Box Mfg. Co.*, 269 Pa. 545, 113 A. 59 (1921) and *Creveling v. Wood & Leman*, 195 Pa. 152 (1880). In addition, the question whether a rule governing the commission rights of mere salesmen is applicable to the plaintiff under the facts of this case is not a question of importance which warrants review by this Court.

IV. The claim that the Court below in sustaining the Trial Court denied petitioner his right to trial by jury in violation of the Seventh Amendment to the Constitution of the United States is entirely without foundation. The Trial Court, in effect, entered judgment *n.o.v.* with respect to petitioner's exorbitant claim for commissions covering a period of many years after the termination of his employment, basing its action simply upon its construction of the contract between the parties, which was a matter completely within its judicial determination without the necessity of resort to jury action. The right of the Court to take such action cannot be questioned. Moreover, the Court's construction of the contract was supported by the parties' own construction thereof, as is established by the testimony of petitioner himself and corroborated by other evidence as to which there is no dispute, and which therefore presented no jury question.

ARGUMENT

I.

This Controversy Concerns Merely the Construction of a Particular Contract and Its Outcome Is of Concern Only to the Parties Involved.

It may well be that no argument against the granting of the Petition in this case would be more appropriate than a simple reference to the statement and conclusion of Mr. Chief Justice Taft in *Layne & Bowler Corporation v. Western Well Works, Inc., et al.*, 261 U. S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1923) that:

> "* * * it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case certainly comes under neither head."

It is equally apparent from an examination of the Statement of the Case, *supra*, that in so far as the nature of this case is concerned, no grounds, substantial or otherwise, exist for the issuance of a writ of certiorari. Thus, the entire matter before the Court of Appeals below was one of the construction of a written contract of employment, whereby petitioner was employed by respondent as its District Sales Manager to perform many and varied functions in a territory comprised of the Eastern portion of the United States, and whereby petitioner was to be compensated, in addition to a

BLEED THROUGH POOR COPY

salary, by an annual bonus consisting of a specified graduated percentage of the "aggregate yearly earnings" from "sales" or the "net volume of sales" in his territory, less salary and selling expenses.

The principal issue is whether the petitioner is entitled to bonus calculated upon deliveries made during the term of that contract, or whether he is entitled to bonus upon all orders booked by respondent during that term, regardless of when the actual deliveries were made. It was the contention of petitioner that he was entitled under the contract to receive bonus on orders booked as such. It was also his contention that his claim fell within the rule that a salesman working on commission, whose sole function is to secure orders, is deemed to have earned his commission when the orders which he secures are accepted by his employer.

The Court of Appeals and the District Court below both deemed the contract to be unambiguous on the point and ruled as a matter of law that the petitioner was not entitled to bonus during the term of his contract on orders booked as such, contrary to the contentions of petitioner. Each Court below referred to the fact that its interpretation was supported also by the practical construction placed upon the contract by the parties themselves. The contention of petitioner that the rule applicable to commission salesmen was applicable to him was likewise rejected on the ground, *inter alia,* that petitioner was employed as a District Sales Manager, supervising a territory and the sales personnel in it, and not as a mere commission salesman whose sole function was to procure orders for respondent.

Obviously, therefore, the controversy relates to a particular contract between private parties and turns upon the facts of a particular case. As such, it is merely private litigation, the outcome of which is of interest only to the parties involved, and there is no question of importance or otherwise which requires decision by your Honorable Court in the public interest. Without laboring the point, it is respectfully submitted that the instant Petition may be classified among those applications described as futile by Mr. Chief Justice Hughes who, in addressing the American Law Institute, stated in language which must be famliar to this Court:

> "Yet the papers submitted must be examined, although on examination the futility of the application is disclosed. For example, we have many applications where the questions raised are those relating to particular contracts or transactions and turn upon the facts of the particular case, and there is no controversy of importance with respect to legal principles. Applications are numerous in which there appears to be no conflict of decision between the circuit courts of appeals, or between federal and state courts in cases where the latter should be controlling, and no real conflict with the decisions of the Supreme Court, and there is an utter absence of any good reason for asking our review. That review, we must emphasize, is in the interest of the law, not in the interest of particular parties. It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general importance so that the system of federal justice may be appropriately admin-

BLEED THROUGH POOR COPY

istered." 20 American Bar Association Journal 341 (1934), cited and quoted in 11 Cyclopedia of Federal Procedure, 2nd Ed., 30, and by Frankfurter and Hart in 48 Harvard L. R. 238, 262-263.

II.

The Decision of the Court of Appeals Below, Which Is Based Upon Pennsylvania Law, Is Not in Conflict in Fact or in Law With Decisions of Other Courts of Appeals.

While the petitioner contends that the decision of the Court of Appeals below is in conflict with decisions in the Courts of Appeals for the Sixth and Seventh Circuits, the contention is untenable as no real conflict exists, as we shall point out.

In the first place, the conflict among Courts of Appeals which justifies the issuance of writs of certiorari pursuant to Rule 19 of this Court, concerns matters as to which the Courts of Appeals may exercise an independent judgment, and not matters in the consideration of which such Courts are bound to apply the law of the respective states over which their jurisdiction extends. Thus, this Court has ruled in *Ruhlin v. New York Life Ins. Co.*, 304 U. S. 202, 206, 58 S. Ct. 860, 861, 82 L. Ed. 1290 (1938) that as to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari, saying:

> "* * * Since jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given to this Court in order 'to secure uniformity of decision,' Magnum Import Co. v. Coty, 262 U. S.

159, 163, 43 S. Ct. 531, 532, 67 L. Ed. 922, a showing of a conflict of circuits on a matter concerning which the federal courts had never denied their right to independent judgment prompted this Court to grant the writ. E.g., Aschenbrenner v. United States Fid. & G. Co., 292 U. S. 80, 82, 54 S. Ct. 590, 591, 78 L. Ed. 1137; Stroehmann v. Mutual Life Ins. Co., 300 U. S. 435, 440, 57 S. Ct. 607, 609, 81 L. Ed. 732. As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."

In *Klaxon Co. v. Stentor Electric Mfg. Co. Inc.*, 313 U. S. 487, 496, 61 S. Ct. 1020, 1021-1022, 85 L. Ed. 1477 (1941), the Court stated that the prohibition in diversity cases against independent determinations by federal courts, where state law controls the decision, extended to the conflict of laws rules of a state, and that

> "* * * Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws."

Furthermore, this Court will not review, save in exceptional cases, the determination of questions of state law

BLEED THROUGH POOR COPY

by the intermediate federal appellate courts. *Huddleston v. Dwyer,* 322 U. S. 232, 237, 64 S. Ct. 1015, 1018, 88 L. Ed. 1246 (1944).

In adjudicating the instant case, the Court of Appeals for the Third Circuit was bound to apply the substantive rules of law obtaining in Pennsylvania (Erie *Railroad Co. v. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188), and did so as will be demonstrated later in this Brief. Similarly, other Courts of Appeals construing employment contracts must follow the law of the states in their jurisdictions controlling the decision. In applying local law, therefore, it is to be expected that decisions among the Courts of Appeals will vary in the same manner as do the rules of law obtaining in such states. Indeed, it is possible that decisions in the same circuit may differ where the Court of Appeals in that circuit is obliged to follow the differing laws of two or more states within its jurisdiction. The only question in such cases on an application for a writ of certiorari is whether the decision of the Court of Appeals follows the controlling state law and not whether it is in conflict with another decision of the same or another Court of Appeals which followed the law of a different state. It is immaterial in the first instance, therefore, whether the decision of the Court of Appeals below in following Pennsylvania law is in conflict with decisions cited by petitioner of the Courts of Appeals for the Sixth and Seventh Circuits, construing Ohio and Illinois contracts respectively, and in which those courts naturally did not purport to follow the law of Pennsylvania. *Ohio Marble Company v. Byrd,* 65 F. 2d. 98 (CCA 6, 1933)

and *Atkinson v. New Britain Machine Co.*, 154 F. 2d. 895 (CCA 7, 1946).

The contention of the petitioner that a conflict exists is untenable for a second reason, namely that the decisions of the three Courts of Appeals are actually in harmony and therefore do not conflict because each was applied to a different fact situation. Each Court of Appeals concerned had before it a different employment contract, with different provisions, performed under a different set of circumstances. The Court of Appeals below alone of such three Courts had before it the employment contract of a District Sales *Manager,* who, for supervising a territory, was to be paid a *bonus* on *aggregate annual earnings* from sales, without the mention of "orders" as such. On the other hand, the other two Courts of Appeals were construing contracts of *salesmen* who were to be compensated by *commissions* on sales. In the *Ohio Marble* case the contract provided that such commissions were payable " * * * whether order is placed * * * direct or thru party of the first part." In the *Atkinson* case the contract provided: "As previously advised we will credit shipments of all orders received subsequent to your connection with us, to your sales." As to the meaning of this language, the Circuit Court of Appeals for the Seventh Circuit concluded (page 901 of 154 F. 2d.):

> "We think a fair construction of this language is that plaintiff's commissions were earned when orders were received by the defendant for sales theretofore made."

All three Courts of Appeals considered the language of the three contracts before them, the acts of the respec-

BLEED THROUGH POOR COPY

tive parties thereunder, and the general rule recognizing the right of commission salesmen to commissions on orders placed with and accepted by the employer. The Courts of Appeals for the Sixth and Seventh Circuits concluded that the language of the contracts and the conduct of the parties supported the contentions of the plaintiffs before them that they were entitled to commissions on orders as such placed with the defendant employers prior to termination of the employment contracts, and that the said general rule was applicable in each case. The Court of Appeals for the Sixth Circuit in the *Ohio Marble* case particularly noted that the plaintiff's obligations were fully discharged when orders were closed and forwarded to his employer and carefully distinguished another situation (which is more like the instant case) when it said (page 101 of 65 F. 2d.):

> "We are not dealing with a situation wherein the agent had not fulfilled his obligation at the time of his discharge."

In the *Atkinson* case the Court cited the *Ohio Marble* case and quoted 4 Williston on Contracts (Rev. Ed.), Section 1030, where it is said:

> "In the case of a salesman working on a commission basis, it is reasonable to assume that his compensation has been earned when he has procured the customer's orders although he does not complete his term of employment."

The Court of Appeals below concluded that the contract and the conduct of the parties under it established that petitioner was entitled to bonus computed only on shipments completed during his term of em-

ployment, and that the general rule applicable to mere commission salesmen in the absence of contractual provisions to the contrary, did not apply to him in view of his position and duties as a district sales manager which, as the contract and petitioner's own testimony reveals, required him to perform various duties in the supervision of his territory and not merely that of the procurement of orders for acceptance by respondent (J.A. 19a-20a, 31a, 50a, 74a-75a, 89a-90a, 176a, 195a, 209a-210a).

It is clear, therefore, that the Courts of Appeals were uniform and in harmony in their legal approach to the controversies before them and applied identical principles of law. That the actual decision of the Court of Appeals below differed from that of the other two Courts is attributable solely to the difference in the contracts and the circumstances and not to a difference in the application of legal principles.

It is submitted, therefore, that no conflict exists between the decision of the Court of Appeals below and the decisions of the Circuit Courts of Appeals for the Sixth and Seventh Circuits as contended by petitioner, and that even if there had been a conflict in fact, it would not have been the type of conflict which would warrant the granting of a writ of certiorari, inasmuch as the Courts concerned would be required to apply the law of the states in their respective jurisdictions.

III.

The Decision of the Court of Appeals Below Is Not in Conflict With Decisions of the Pennsylvania Courts.

Petitioner's contention that the decision of the Court of Appeals below is in conflict with decisions of the Pennsylvania courts is no less untenable than its similar contention with respect to the decisions of the Courts of Appeals for the Sixth and Seventh Circuits. In the first place, as will be demonstrated hereinafter, no such conflict in decision exists in fact. Secondly, the question presented, *i.e.*, whether the rule applicable to commission salesmen governs this case, does not have the quality of importance which is required by Rule 19 of this Court for the granting of a writ of certiorari. As a result, the Petition should be dismissed on the latter ground alone.

In support of his contentions that a conflict exists, petitioner cites and discusses in his Petition (pages 18 and 19) several Pennsylvania decisions which followed the general rule applicable to commission salesmen. In each of those cases, the Supreme Court of Pennsylvania held that the plaintiff was entitled to his commissions when the orders which he procured were accepted by the defendant employer, but in each case, unlike in the case at bar, the plaintiff had no duty to perform other than to secure orders. Those and other cases relied on by petitioner clearly show that the rule that a salesman's commission is deemed earned when orders are accepted by his employer is not applicable in a case (1) where the employee in order to earn his compensation has duties to perform in addition to

merely procuring orders, or (2) where the parties by their contract have agreed on some other method of compensation, or (3) where the conduct of the parties shows that they have agreed on some method of compensation other than on orders procured.

That the foregoing fairly sets forth the established law in Pennsylvania on the subject, with which the decision of the Court of Appeals below is in complete harmony, is readily apparent from two decisions of the Pennsylvania Supreme Court, one of them being *Newhall v. Victor Box Mfg. Co.*, 269 Pa. 545, 113 A. 59 (1921), which was cited by the Court below (Opinion: Petition p. 68. In that case the plaintiff entered into a contract with the defendant to act as its general sales agent for certain of its products, plaintiff to receive three per cent "of the gross receipts of the company from all goods sold by it." Plaintiff received his commissions on goods delivered and paid for, but demanded compensation on "gross sales" as shown by orders secured, alleging that some of the orders obtained had been, or were to be, cancelled, a liquidation of the company being in contemplation. Defendant filed a statutory demurrer on the ground, *inter alia*, that commissions were payable only on the basis of receipts, and that the claim, so far as founded on contracts with the United States government, was unenforceable as opposed to public policy. The demurrer was sustained, "it being apparent that plaintiff had received the full amount of commissions due to him on sales consummated by payments." The Supreme Court affirmed, saying (p. 547):

> "A careful examination of the contract of employment leads to the conclusion that it was properly construed by the court below, and that the

BLEED THROUGH POOR COPY

claim of the agent was limited to commissions based on moneys actually received by the company as a result of sales made by him, or by others, of the class of products in contemplation at the time the agreement was made. The writing is explicit as to this, and though subsequent phrases, standing alone, might lead to a different interpretation, yet, taken in connection with the positive declaration in paragraph 3, and to which the subsequent statements are referred, the intention of the parties is clear. This is not the case of a broker who performs his full service by securing a purchaser for property, and whose work is completed when the minds of buyer and seller have been brought together, but of an agent, whose rights, as well as duties, have been expressly defined. 'The sales contemplated in (the) agreement were actual sales in a commercial sense, not mere contracts to sell': Creveling v. Wood & Leman, 95 Pa. 152, 157."

In *Creveling v. Wood & Leman,* 95 Pa. 152 (1880), also cited by the Court below (Opinion: Petition, p. 68), the defendant appointed plaintiffs as his selling agents for the sale in eastern markets of railroad and bar iron, plaintiffs to be paid a commission on all "sales" in their district. The plaintiffs effected a contract of sale for 4500 tons, of which only 646 tons were delivered because the purchaser was unable to pay for any more. Plaintiffs filed suit for commissions for the entire tonnage contracted to be sold. In a trial before a jury the lower Court found for plaintiffs, holding that plaintiffs were brokers and that commissions were due "upon the amount which was sold" and not upon the amount "de-

livered". The Supreme Court of Pennsylvania reversed and ordered a new trial, saying at page 157:

> "* * * If the present claim had been by a broker for commissions on the sale of real estate, the ruling of the court would have been accurate. But this was a case of merchandise, and the plaintiffs were not acting in the capacity of brokers of the defendants. They were agents to sell under a special agreement. The sales contemplated in said agreement were actual sales in a commercial sense, not mere contracts to sell."

Referring to the practical construction of the contract by the parties in the same case, the Pennsylvania Supreme Court added (page 158):

> "* * * If the plaintiffs were entitled to commissions on the contract to sell, they had earned commissions on the entire forty-five hundred tons the moment the contract was entered into. No claim, however, was made for commissions on the undelivered iron until after the matter fell through by reason of the inability of the purchaser to pay. This portion of the claim was evidently an afterthought. The parties to the agreement regarded it as a contract for commissions on actual sales. On the 15th of December 1877, more than a month after the last iron had been delivered, the plaintiffs sent to the defendant their bill for services to that time, in which they claimed one and a half per cent. on the six hundred and forty-six tons delivered, and made no claim for percentage on the residue of the forty-five hundred tons. The construction placed upon their agreement by the parties themselves at the time they were acting under it, was the

BLEED THROUGH POOR COPY

proper one. There can be no recovery for commissions on the forty-five hundred tons beyond the amount actually sold and delivered."

This Court is also referred briefly to *Brandenburg v. Brooke,* 45 Pa. Superior Ct. 490 (1911) wherein the plaintiffs were employed as sole agents under a written agreement whereby they were to receive a commission on "the aggregate net price of all automobile bodies, etc., sold, manufactured and shipped by the company during the continuance of the contract." When the contract was terminated by reason of the insolvency of the employer, it was held that plaintiffs were entitled to commissions only on shipments completed prior to the date of the receivership, but not on shipments made thereafter although pursuant to prior orders.

In support of his contention that the Court below failed to follow the law of Pennsylvania, petitioner on pages 19 and 42 of the Petition also refers the Court to the decision of *Albright v. Kalbitzer,* 62 F. S. 815 (1945). In so doing, petitioner presents unassailable evidence of the flimsy character of his contention, for that case involved the contract of a distributor, not an employee, and, what is more important, was decided by District Judge Harry E. Kalodner, who was one of the three able Circuit Judges who participated and concurred in the decision below.

Accordingly, no further argument appears necessary that the Court of Appeals below, contrary to the contentions of petitioner, has not decided an important state question in a way in conflict with applicable state law within the meaning of Rule 19 of the Revised Rules of this Court.

IV. Petitioner Has Not Been Deprived of His Right to Trial by Jury.

Petitioner's final contention in his Petition is that the Court of Appeals, in affirming the action of the District Court in setting aside the verdict and judgment with respect to Question No. 1 of the Special Verdict, thereby deprived petitioner of his right to trial by jury in contravention of the Seventh Amendment to the Federal Constitution.

This contention is likewise utterly without foundation for several reasons. Most important of these is the fact that the District Court and the Court of Appeals both concluded that the contract was unambiguous on the issue encompassed in Question No. 1 and that therefore the question was one of law for the Court to decide and not one of fact for the jury. That it is the function of the Court and not of the jury to construe unambiguous contracts is a rule too well-settled to require argument.

Petitioner's contention is erroneous also because it is based entirely on an immaterial portion of the evidence in the case, viz., that petitioner testified that he did not know that his bonus for 1940 included compensation on shipments made pursuant to orders received by respondent while petitioner's predecessor, P. L. Rhodes, was the Eastern District Sales Manager. The first answer to this is that the matter of practical construction was entirely a secondary and supporting consideration inasmuch as the question was resolved in the first instance by construction of the contract itself as a matter of law. Furthermore, petitioner did not deny or

BLEED THROUGH POOR COPY

contradict the additional findings by the Master that petitioner's 1940 bonus also included compensation on other shipments, *inter alia,* where the orders therefor had been placed with respondent at a time when no sales manager at all was employed in that territory (Court's Ex. 1, Schedule 5, J.A. 150a-151a, 307a-308a).

More important, the record in this case is replete with uncontradicted evidence, both oral and written, which petitioner does not mention in his Petition, that the long established practice of respondent was to pay commissions and bonus only on shipments completed during the term of employment of its sales mangers, and not on orders received, and that petitioner knew of this practice, accepted it, and enjoyed its benefits.

Without attempting to burden the Court with a review of all the evidence on the point, it should be noted briefly that petitioner himself testified that his bonus for 1940 (which is prior to the period in dispute) was calculated solely on *shipments* made that year (J.A. 58a), although the bonus statement for that year was headed "Bonus on 1940 Sales" and not "Bonus on 1940 *Shipments*" (Def. Ex. D., J.A. 275a, 359a-360a). Petitioner received this bonus statement (J.A. 67a) along with an explanatory letter of transmittal (J.A. 360a) which enclosed the 1941 contract in suit for execution by petitioner (J.A. 97a-98a). Petitioner testified that he accepted the 1940 bonus statement amounting to $1,346.89 as correct (J.A. 62a, 64a-65a, 67a, 127a). He was "sincerly thankful to receive the credit memo for the 1940 bonus" and, if possible, he would "better the 1940 sales record in 1941," as he advised respondent in his answering letter dated February 4, 1941 (Def. Ex. E., J.A.

98a, 99a-100a). With it he enclosed the 1941 contract (J.A. 100a), whose material provisions are identical with the 1940 contract, as petitioner himself understood and testified (J.A. 56a-58a).

While there is a great deal more evidence in the record as to respondent's practice to pay bonus only on shipments and the petitioner's acceptance of that practice, including uncontradicted and undisputed testimony by respondent's witnesses (J.A. 166a-167a, 169a, 170a-172a, 210a), the evidence referred to above is sufficient in itself to justify the construction of the contract as a matter of law, if it were ambiguous, contrary to the contention of petitioner in this case. It is, of course, the settled law in this state as elsewhere, that the Court will adopt that construction of a contract which the parties themselves have placed upon it. *Commonwealth v. Henry W. Horst Co.,* 364 Pa. 403, 407, 72 A. 2d. 131, 133 (1950); *United States National Bank v. Campbell,* 354 Pa. 483, 489, 47 A. 2d. 697, 701 (1946); *Alpha Claude Neon Corp. v. Pennsylvania Distilling Co., Inc.,* 325 Pa. 140, 143, 188 A. 825, 826 (1936); *Fisher v. Ronemus,* 267 Pa. 325, 330, 110 A. 87, 89 (1920); *McMillin v. Titus,* 222 Pa. 500, 503 72 A. 240 (1909); *Sherman v. Consolidated Dental Mfg. Co.,* 202 Pa. 446, 450-451, 52 A. 2d. 1 (1902); *Peoples Natural Gas Co. v. Braddock Wire Co.,* 155 Pa. 22, 25, 25 A. 749 (1893); *Creveling v. Wood & Leman,* 95 Pa. 152, 158 (1880). Many cases, furthermore, refer to and apply the long established rule that where the evidence in a jury case is clear and uncontraverted so that there remains simply a question of applying the law to the admitted or undisputed facts, it is the duty of the Court to direct a verdict. *Koons v. Steele,* 19 Pa. 203, 210

BLEED THROUGH POOR COPY

(1852); *Wannamaker v. Burke,* 111 Pa. 423, 430, 2 A. 500, 504 (1886); *Wachter v. Phoenix Assurance Co.,* 132 Pa. 428, 440, 19 A. 289, 291 (1890); *Dalmas v. Kemble,* 215 Pa. 410, 64 A. 559 (1906); *McMillin v. Titus,* 222 Pa. 500, 503, 511, 72 A. 240 (1909); *Collison v. Philadelphia Company,* 233 Pa. 350, 353, 82 A. 474 (1912); *Kosson v. West Penn Power Co.,* 293 Pa. 131, 136, 141 A. 734 (1928); *Armstrong v. Standard Ice Co.,* 129 Pa. Superior Ct. 207, 211, 195 A. 171 (1937); *Say v. Prior Oil Co.,* 157 Pa. Superior Ct. 629, 43 A. 2d. 417 (1945).

This Court also said in *A. B. Small Co. v. Lamborn & Co.,* 267 U. S. 248, 254, 45 S. Ct. 300, 303, 69 L. Ed. 597 (1925):

> "The rule for testing the direction of a verdict, as often has been held, is that where the evidence is undisputed, or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in this jurisdiction, as in many others."

It is settled in Pennsylvania that the practice authorized by statute to grant judgment *n.o.v.* if a point requesting binding instructions has been reserved or declined neither transgresses the Fourteenth Amendment to the Federal Constitution nor the requirement of trial by jury established by the Constitution of the Commonwealth. *Coffey v. The Maccabees,* 292 Pa. 58, 63, 140 A.

551, 552 (1928); *American Warming & Ventilating Company v. Fayette Lumber Company, Ltd.*, 57 Pa. Superior Ct. 608 (1914); *Stryker v. Montoursville Borough*, 57 Pa. Superior Ct. 100 (1914). Similarly, it has long been settled that the directed verdict practice as administered in the Federal Courts does not deprive parties of their right of jury trial as guaranteed by the Seventh Amendment. See *Galloway v. United States*, 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943), and earlier cases cited therein.

The adoption by this Court of Rule 50(b) of the Federal Rules of Civil Procedure, which automatically reserves a legal question raised by a request for a directed verdict, laid to rest any question as to the power of the Federal Courts after verdict and judgment, pursuant to motion, to set aside the verdict and judgment, to enter judgment, or to grant a new trial.

Before concluding, reference should be made to the complaint of petitioner on page 47 of the Petition that if the contract was not clear it should have been construed by the Court against the respondent who drew it. The simple answer is that the Court below construed the contract to be clear and, even if it were not, the rule of construction sought to be applied by petitioner is the last one which the courts will apply, and then only if a satisfactory result cannot be reached by any other rules of construction. *Commonwealth v. Nelson-Pedley Construction Co.*, 303 Pa. 174, 180, 154 A. 383, 385 (1931), quoting 13 C.J. 545; 17 C.J.S. 753-754.

V. Conclusion.

For the reasons stated hereinabove, it is respectfully submitted that the granting of the Petition for Writ of Certiorari is unwarranted in this case and should therefore be denied.

Respectfully submitted,

CHARLES M. THORP, JR.
Counsel of Record for
Respondent Homestead Valve
Manufacturing Company

Of Counsel:
CLYDE A. ARMSTRONG
JOSEPH E. MADVA
THORP, REED & ARMSTRONG